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No. 89-441

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ROSEMARY MENARD-SANFORD, *et al.*,

Petitioners,

—v.—

A. H. ROBINS COMPANY, INCORPORATED, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION BY RESPONDENT RALPH R. MABEY, EXAMINER OF A. H. ROBINS COMPANY, INCORPORATED

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Fourth Circuit properly held that 11 U.S.C. § 105(a) authorized and 11 U.S.C. § 524(e) did not prohibit the injunction of claims against non-debtor third parties in conjunction with a Chapter 11 plan of reorganization providing for full payment of such claims where the funds to be used to pay such claims would not be available without the plan's injunction provisions?

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Respondent Ralph R. Mabey, Examiner of A. H. Robins Company, Incorporated ("A. H. Robins"), appointed by the District Court pursuant to 11 U.S.C. § 1104(b), respectfully requests that this Court deny the petition for a writ of certiorari to review a judgment of the United States Court of Appeals for the Fourth Circuit in this case. The opinion is reported at 880 F.2d 694.

STATUTES INVOLVED

The statutes involved are Sections 105(a), 524(e), and 1123(b)(5) of the Bankruptcy Code.

Section 105(a) provides:

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of

this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

Section 524(e) provides:

Except as provided in subsection (a)(3)[1] of this section, discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.

Section 1123(b)(5) provides:

Subject to subsection (a) of this section,[2] a plan may— . . . (5) include any other appropriate provision not inconsistent with the applicable provisions of this title.

REASONS FOR DENYING THE PETITION

If the petition is granted, compensation to injured persons will be delayed and the existence of the payment fund to be created for them under the plan will be jeopardized. This case does not present any "special and important reasons" which warrant granting certiorari. S. Ct. R. 17.1. It involves no conflict with decisions of this Court, no constitutional issues, no conflict among the Courts of Appeals, and no question whose resolution would significantly affect the administration of the bankruptcy laws.

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1 Subsection (a)(3) addresses community claims concerning an individual debtor and that debtor's spouse.

2 Subsection (a) does not address injunctions against third parties.

A. Granting the petition will delay compensation to injured persons and jeopardize the payment fund set aside for them.

As part of the duties assigned to him by the District Court, the Examiner assisted in the development and negotiation of the plan of reorganization (71a). The plan embodies compromises from the positions of all constituents which resulted in support by the major negotiating representatives: the Dalkon Shield Claimants Committee, the Official Unsecured Creditors Committee, the Official Committee of Equity Security Holders, and the debtor, A. H. Robins.[3] The plan was accepted by 131,761 Dalkon Shield Claimants who comprise 94.38% of all Dalkon Shield Claimants who voted on the plan (9a-10a, 71a). It has been and remains the Examiner's view that this plan is an appropriate resolution of this bankruptcy case and should be preserved intact notwithstanding the petitioners' objections.

The petition challenges only one element of the plan, the injunction (Petition at 3).[4] Petitioners seem willing to take

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3 Disclosure statement at 1, 14. In letters sent with the disclosure statement, the Dalkon Shield Claimants Committee, the Official Unsecured Creditors Committee, and the Official Committee of Equity Security Holders recommended acceptance of the plan. Joint Appendix in the Court of Appeals at 362-366, 372-375. At the hearing on confirmation of the plan, the Examiner and counsel for the Dalkon Shield Claimants Committee, the Official Unsecured Creditors Committee, and the Official Committee of Equity Security Holders supported confirmation of the plan. Joint Appendix in the Court of Appeals at 207, 214-215, 222, 223-224. The Legal Representative of the Future Tort Claimants initially objected to the plan but later stated that he did not oppose the plan.

4 Petitioners argue that the funds set aside under the Plan to pay Dalkon Shield claims "may be inadequate" and argue that as a consequence "the entire risk of inadequate funding has been transferred from Robins' shareholders to Dalkon Shield victims" (Petition at 2). But petitioners do not challenge the District Court's finding of fact, sustained by the Court of Appeals, that "[t]he payments into the Trusts provided for under Sections 5.01(b), 5.02(b) and 6.07 of the

advantage of the payments provided under the plan without respect for the injunction that makes those payments possible by preventing indemnity claims by third parties against the funds and by preserving the peace with respect to Dalkon Shield litigation, which peace is so important to the reorganized company whose major business is the sale of consumer products. But the implications of the petition are much broader than the petition suggests. The injunction cannot be considered in isolation.

In the circumstances of this case, the Court cannot consider the plan's injunction without jeopardizing the entire plan. The plan's elements were presented, voted upon, accepted, and confirmed as an integrated, non-severable, and mutually-dependent whole, arduously achieved by negotiation and compromise with all parties in interest represented. By its terms, and as a matter of economics, the plan stands or falls as a whole (17a-19a, 43a ¶ 14, 50a ¶ 35, 73a, 74a, 80a-81a, 82a).

Furthermore, $2.255 billion, which is most of the total funding for Dalkon Shield Claimants under the plan, results from the acquisition (through a subsidiary merger) of A. H. Robins by American Home Products Corporation. Of that amount, $2.155 billion[5] is not available to pay Dalkon Shield Claimants until the plan has been consummated and may never be available if the order confirming the plan does not become final by

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Plan are sufficient to pay all Allowed Dalkon Shield Personal Injury Claims, Allowed Dalkon Shield Liquidated Claims and costs and expenses of the Trusts in full" (42a-43a). Thus, petitioners' arguments concerning risk of inadequate funding and the shifting of that risk are not properly before this Court.

5 $100 million used for trust administrative expenses, trust work preparatory to making distributions, and payments to Dalkon Shield Claimants holding liquidated claims or accepting an expedited settlement has already been paid. As of September 21, 1989, 81,526 claimants have accepted an expedited settlement and have been paid a total of $53,074,600 out of these funds. In addition, previously liquidated Dalkon Shield Claims have been paid by the trust in the amount of $1,628,874.56.

December 31, 1989.[6] Indeed, should this Court grant the petition thereby delaying the entry of a final order past this deadline, and should American Home Products Corporation thereby fail to acquire A. H. Robins, then the plan of reorganization would fail, its injunction would never become effective and the issue to be decided by the Court would become moot.

The most important objective of the bankruptcy case of A. H. Robins has been to secure an equitable means of compensating persons injured by the Dalkon Shield. The bankruptcy case began over four years ago on August 21, 1985. In April of 1987, the Examiner, the Official Dalkon Shield Claimants Committee, and A. H. Robins proposed an emergency fund for medical treatment on an expedited basis to injured women whose infertility caused by the Dalkon Shield was potentially reversible through surgery or *in vitro* fertilization. In *Official Committee of Equity Security Holders v. Mabey (In re A. H. Robins Co.)*, 832 F.2d 299 (4th Cir. 1987), *cert. denied*, 108 S. Ct. 1228 (1988), the District Court's order approving that proposal for funding emergency medical treatment was reversed. The Court of Appeals said payment to injured women must await a plan of reorganization. Now, when that plan is ready to be consummated, granting the present petition will further delay the compensation of injured victims of the Dalkon Shield.

B. The Court of Appeals' decision is not in conflict with any decision of this Court and presents no constitutional question.

Petitioners have not cited any decision of this Court with which the Court of Appeals' decision is in conflict. This Court has not interpreted Sections 524(e) or 1123(b)(5) and only once

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6 The merger agreement provides that it may be terminated by American Home Products Corporation if the plan confirmation order has not become a final order prior to the first anniversary of the entry of the confirmation order (July 26, 1989). Disclosure statement at 33; merger agreement § 8.1(iii). Under an agreement entered into after the completion of the record in the Court of Appeals, the July 26, 1989, date was extended to December 31, 1989.

has addressed Section 105.[7] This case involves interpreting the injunctive powers available under Sections 105(a) and 1123(b)(5) in light of Section 524(e); it does not involve any issues of constitutional law.[8]

C. There is no conflict among the Courts of Appeals on the issues of statutory interpretation presented in this case.

This case does not present an opportunity to resolve a conflict among the Courts of Appeals. It is true that in discussing whether Section 524(e) prohibits the discharge of non-debtors under a reorganization plan the Court of Appeals in this case discussed holdings in *Underhill v. Royal*, 769 F.2d 1426 (9th Cir. 1985) and *Union Carbide Corp. v. Newboles*, 686 F.2d 593 (7th Cir. 1982) as well as *dicta* in *Republic Supply Co. v. Shoaf*, 815 F.2d 1046 (5th Cir. 1987).[9] Nevertheless, no Court of Appeals has held that an injunction such as the injunction in this case is impermissible where it is an essential part of a reorganization plan providing for full payment of the claims to be enjoined.

Union Carbide construed Section 16 of the former Bankruptcy Act, 11 U.S.C. § 34 (repealed 1978) which provided that:

> [t]he liability of a person who is a co-debtor with, or guarantor or in any manner a surety for, a bankrupt *shall not* be altered by the discharge of such bankrupt (emphasis supplied).

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7 *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

8 Although petitioners append a tenuous due process argument to their list of "factors support[ing] review" of the injunction provisions (Petition at 13), that argument was not presented to the Court of Appeals and is not properly before this Court. Moreover, petitioners do not (and cannot) contend that they have not had notice or an opportunity to be heard concerning the injunction provisions.

9 *Republic Supply* did not reach the question of the power of a bankruptcy court to confirm a plan providing for the cancellation of a non-debtor's guaranty of a debt provided for in the plan.

By contrast, Section 524(e) provides that:

> discharge of a debt of the debtor *does not* affect the liability of any other entity on, or the property of any other entity for, such debt (emphasis supplied).

Section 16 may have been prohibitive while Section 524(e) is merely explanatory.[10] Moreover, *Union Carbide* addressed a plan of reorganization under which only 20% of the claims in question would be paid. The plan in this case provides for payment of 100% of the claims subject to its injunction provisions (42a-43a).

Underhill did not address the injunctive powers of bankruptcy courts under Section 105(a) or its predecessor or under Section 1123(b)(5). *Underhill* involved a reorganization plan which paid only 50% of the claims it sought to release. Furthermore, the plan's injunction provisions in the case before the Court were found to be essential elements and prerequisites to the availability of the funds to be used to pay Dalkon Shield Claims (17a-18a, 19a, 43a ¶ 14, 50a ¶ 35, 73a, 74a, 80a-81a). In *Underhill* no similar findings of fact were made.

United States v. Huckabee Auto Co., 783 F.2d 1546 (11th Cir. 1986) does not demonstrate a conflict among the Courts of Appeals on the question presented in this case. Although *Huckabee* said bankruptcy courts could not enjoin the IRS from collecting taxes from third parties the Court of Appeals did not construe or even cite Section 524(e). Moreover, although the Court of Appeals did not reach them, *Huckabee* presented questions of the power of a bankruptcy court to enjoin the IRS from collecting taxes from third parties in the teeth of an express federal statute prohibiting such injunctions and a claim

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10 The *dicta* in *Republic Supply v. Shoaf*, *supra*, cited by the Court of Appeals (18a) recognizes that Section 524(e) is not prohibitive. An earlier opinion of the same court, cited by petitioners, noted the explanatory function of Section 524(e) which delineates the ordinary effect of a bankruptcy discharge. *United States v. Stribling Flying Service Inc.*, 734 F.2d 221, 223 (5th Cir. 1984) (plan did not purport to affect third-party debt). Thus, rather than representing an intra-circuit conflict, as petitioners seem to suggest, these two opinions illustrate a consistent interpretation of Section 524(e).

of sovereign immunity. *See Huckabee*, 783 F.2d at 1548 n. 3; 26 U.S.C. § 7421. No statutory conflicts or claims of immunity are present in this case.

In an opinion decided the day after the filing of the petition in this case, the United States Court of Appeals for the Ninth Circuit declined to overturn a bankruptcy court's temporary injunction of the prosecution of claims against third-party guarantors of a debtor's obligation. Although the guarantors argued that the injunction should have been made permanent and cited the Court of Appeals' decision in this case as precedent, the court found that a permanent injunction was not appropriate under the facts before it. The court rightly recognized that the holding in this case now before this Court is expressly limited to its unusual facts and, on that ground, determined that its opinion is not in conflict. *American Hardwoods, Inc. v. Deutsche Credit Corp. (In re American Hardwoods, Inc.)*, No. 87-4438, 1989 U.S. App. LEXIS 13822 (9th Cir. September 15, 1989).

Finally, the Court of Appeals' decision is not in conflict with the only other decision of a Court of Appeals which has addressed the injunctive powers of bankruptcy courts under Section 105(a) in circumstances analogous to those in this case. *MacArthur Co. v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 837 F.2d 89 (2d Cir.), *cert. denied*, 109 S. Ct. 176 (1988).

D. The question presented does not significantly affect the administration of the bankruptcy laws.

The fact-specific circumstances of this case demonstrate the limited applicability of the Court of Appeals' ruling and of any decision on the merits which this Court might render. The Court of Appeals emphasized that its holding was narrow:

> In this situation where the Plan was overwhelmingly approved, where the Plan in conjunction with insurance policies provided as a part of a plan of reorganization gives a second chance for even late claimants to recover where, nevertheless, some have chosen not to take part in

> the settlement in order to retain rights to sue certain other parties, and where the entire reorganization hinges on the debtor being free from indirect claims such as suits against parties who would have indemnity or contribution claims against the debtor, we do not construe § 524(e) so that it limits the equitable power of the bankruptcy court to enjoin the questioned suits. We leave questions concerning cases in which § 524(e) does apply for another day.

(19a). This holding, based on the particular facts of this case, will not significantly affect the administration of the bankruptcy laws. *See American Hardwoods, supra* (finding that the holding in this case is limited to its unusual facts).

CONCLUSION

For the foregoing reasons, the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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